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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

DELTA AIR LINES, INC., *et al.*

Chapter 11

Case No. 05-17923 (ASH)

Debtors.

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**OBJECTION OF WILLIAM BUERGEY, *ET AL.* TO DEBTORS' MOTION FOR
APPROVAL OF SETTLEMENT AGREEMENT WITH PENSION BENEFIT
GUARANTY CORPORATION**

William Buergey, *et al.*, collectively (“Objectors”) (a full list of Objectors will be filed with the Court) hereby object to Debtors’ Motion for Approval of Settlement Agreement with Pension Benefit Guaranty Corporation (the “Motion”). William Buergey and the other Objectors are retired Delta Airlines, Inc. pilots. In support of this Objection, the Objectors respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Objectors are approximately 820 retired Delta Air Line pilots, who are united in their effort to prevent the termination of the Delta Pilots Retirement Plan (“Pilots Plan”) or to mitigate impact of the termination of the Pilots Plan on them and their beneficiaries. The Objectors hastily were united in purpose after the sudden unexpected withdrawal of objections to the

termination of the Pilots Plan by Delta Pilots Pension Termination Opposition LLC (“DP2”) during the hearing held by this Court on September 1 and September 5, 2006. Many of the Objectors are former supporters of DP2 and Delta Pilots Pension Preservation Organization (“DP3”), but have ceased their support of those organizations after those organizations ceased to press for continuation of the Pilots Plan in return for payment of those organizations’ attorneys fees.

2. Many of the Objectors filed an appeal from this Court’s Order, dated September 5, 2006, finding that Debtors met the test for voluntary distress termination of the Pilots Plan and authorizing Debtors to pursue termination of the Plan. By decision, dated December 11, 2006, the District Court denied the appeal, unable to find that this Court’s factual findings were clearly erroneous in light of the one-sided evidence that Debtors had presented without opposition, contradiction, meaningful cross-examination or presentation of evidence by opposing parties. The District Court, in its decision, specifically did not reach the issue raised by the effect on termination of U.S. Airways Group, Inc.’s (“U.S. Air”) pre-hearing contact with Delta regarding the possibility of a merger or USAir’s post-petition offer (*see* Slip Opinion, p. 16 n. 10 of Judge Cote’s Decision) (“it is not necessary to reach the issue [of U.S. Air’s interest in merging with Delta], since it was not raised in the first instance with the Bankruptcy Court.”). That contact, or offer, as the case may be, is the subject of a pending motion before this Court, to re-open the September 1, 2006 Section 4041 hearing to consider this new evidence and its impact on Debtors’ alleged “need” to terminate the Pilots Plan.

3. The instant Objections sets forth reasons why this Court should reject the proposed Settlement Agreement (“Agreement”) with the Pension Benefit Guaranty Corporation (“PBGC”) to terminate the Pilots Plan. If the Agreement is not rejected outright, because of the lack of

“reasonableness” of the proposed deal, then this Court should reject the Agreement for its lack of sufficient protections of the retired pilots. Time and time again, when rejecting the pleas of the retired pilots to prevent Debtors from dismantling and diminishing its retirement pension and health benefits, this Court has taken great care to pay lip service to the contributions of the retired pilots to Delta during their accumulated thousands of years of service and this Court has stated its regret for inflicting the pain of the bankruptcy on the pilots, as it repeatedly has approved Debtors’ requests. This Court now has an opportunity, without harm to the Debtors or the other creditors of Debtors, to require that the retired pilots be treated fairly by PBGC (and more favorably than the Agreement treats them), if the Pilots Plan is terminated and placed in the trusteeship of PBGC. As shown, PBGC has the authority to mitigate the impact of termination of the Pilots Plan on the retired pilots and this Court should require that PBGC exercise that authority before the proposed Settlement Agreement is approved.

OBJECTIONS

4. Debtors propose paying PBGC \$2.2 billion plus \$225 million in senior unsecured notes or cash, plus \$7.5 million to PBGC for its fees and disbursements to settle a claim by PBGC, which PBGC alleges is approximately \$2.989 billion. Considering that Debtors are advocating what practically amounts to payment in full of PBGC’s claim, one has to wonder what all of the hoopla about termination has been. Considering the tens (maybe hundreds?) of millions of dollars that Debtors have paid their counsel, consultants, experts, etc. to obtain approval to terminate the Pilots Plan, it appears that if all of the stock, notes, money, etc. that will be paid or has been paid by the Debtors to PBGC, counsel, consultants, experts, etc. to terminate the Plan, instead, had been paid to the Pilots Plan, the alleged “need” to terminate the Pilots Plan would likely be obviated. The

stock to be issued by new Delta may be less expensive for the Debtors' estate to pay than its equivalent value in cash, but the cash value of the stock to be issued maintains its full value to the recipient, be it PBGC or the Pilots Plan.

5. Nowhere in its thirteen-page Motion or its eighteen-page Agreement, do the Debtors set forth the amount that Debtors allege is owed or will be owed by them to the PBGC. Debtors are asking that this Court find that the proposed settlement is "in the best interests of the estate" (*see* Debtors' Motion, ¶ 10), but admit that this Court must "form an informed and independent judgment as to whether "[the] . . . proposed compromise is in the best interests of the Debtor's estate." *Ibid.* Debtors also advise the Court that it must determine that the settlement "is truly the product of 'arm's length' bargaining." *Id.* at ¶ 11. It appears that the Debtors are asking this Court to perform an impossible task. While it is clear that Debtors dispute the \$2.989 billion amount stated by PBGC, as the amount of its claim, Debtors expect this Court to make an "informed" decision, without Debtors stating the amount they expect they would pay if the matter were litigated and they were successful in the litigation. In short, how can this Court be expected to determine that the compromise is a good one without knowing the low end of the spectrum, *i.e.*, the amount that Debtors would pay, in their opinion, if the compromise is not approved. Clearly, it is better for the Debtors and creditors if Debtors pay \$2.2 billion to settle a claim worth \$2.989 billion, but not one that Debtors' estimate is worth only \$1.2 billion, if the Plan is not terminated.¹

¹Debtors argue in their Motion, "the magnitude, priority and secured or unsecured status of PBGC's claims are *highly uncertain* and would surely be heavily litigated absent settlement." Motion, ¶ 14. (emphasis added). While Debtors indicate there is an \$800 million difference between the PBGC's claim under the PBGC's disputed method of valuation of the unfunded benefit liability claims above the \$2.2 billion settlement amount, Debtors do not state the difference between their calculation of the unfunded benefit liability and the settlement amount. *Id.* at ¶ 16.

6. In its Motion to Approve Termination of the Plan (“4041 Motion”), Debtors represented that the Pilots Plan had either come out of “liquidity shortfall” as of July 1, 2006 or would be out of “liquidity shortfall” by October 1, 2006. Debtors’ argument was that termination was necessary, because once the Pilots Plan had come out of liquidity shortfall, the lump sum benefit would again be available to active pilots, whom Debtors persuaded this Court would then retire in droves. Debtors now submit to the Court that the Pilots Plan may remain in liquidity shortfall and the “lump sum retirement benefit window” remain closed until “Delta’s emergence from Chapter 11, if not [some unspecified time] before.” Motion, ¶ 20. Of course, this argument did not take into account Delta’s ability to close the lump sum window, at anytime, by filing a Notice of Intention to Terminate the Pilots Plan after receiving notices of retirement and requests for the lump sum payment, but before actual payment of the lump sum. Nor did it take into account PBGC’s ability to discontinue the availability of the lump sum benefit by implementing an involuntary termination, an act that the PBGC surely would take if it saw the unfunded vested liability of the Pilots Plan rising at an alarming rate due to lump sum payments being made to newly retired pilots. The lump sum window is shut immediately, before a nickel is paid out, once the termination notice is filed by Delta or PBGC. The time between request for payment of a lump sum retirement benefit and actual payment by the Plan may be months giving ample time to termination if termination is “needed.”

7. If Debtors were to repay the Pilots Plan directly, by infusing Pilots Plan with stock in new Delta with a market value of \$2.2 billion and \$225 million in senior unsecured notes or cash, the Pilots Plan would be a relatively healthy, if not perfectly healthy, retirement plan. It is highly likely that the Pilots Plan has made strong investment gains over the last year or two, as a result of the gains made in the stock market, where presumably, the majority of its assets are invested. To

the extent that the Pilots Plan also owns real estate, that sector of the market has made spectacular gains over the last five years, subject only to the recent leveling off of the real estate market.

8. The retired pilots are confident that, considering all of the above, and the offer of USAir to purchase Delta, this Court should give another look at the alleged “need” to terminate the Pilots Plan, which it appears can be averted, at least temporarily and possibly permanently. Immediate termination is premature. The alleged operational problems caused by the imagined mass termination of Delta pilots can be managed. Since the Pilots Plan remains in liquidity shortfall, the lump sum benefit window is closed. It appears that Delta does not foresee that window opening until it emerges from bankruptcy. *See* Motion, ¶ 20. During that time, (1) legislative efforts are likely to close the lump sum window permanently for the Pilots Plan, or (2) Delta can reinstate its plan for rehiring its recently retired pilots on a seniority basis to fill any shortfall caused by pilot retirements – and the retired pilots can be up and running to fly all aircraft within a relatively short period of time (in many cases, ten days or less), (3) the Pilots Plan can obtain approval to amend its plan of benefits to eliminate or downwardly modify the lump sum benefit for hardship reasons, and (4) Delta may be purchased by another airline. Finally, with the recent approval given to foreign air carriers to raise their mandatory retirement age to 65, it is likely that the United States will reciprocate and raise its mandatory retirement age for commercial pilots to 65 in short order. With the opportunity to increase their highest earning years to age 65, there is little motive for active pilots to take early retirement in order to take a lump sum benefit, especially if they know by doing so, it will cause termination of the Pilots Plan, and as Debtors predict, liquidation of their employer.

9. The PBGC has a wide latitude of discretion to soften the blow of a plan's termination and trusteeship by PBGC on the retired participants in a terminated plan. The PBGC's regulations state:

In order to avoid abuse of the plan termination insurance system, *inequitable treatment of participants and beneficiaries*, or the imposition of unreasonable burdens on terminating plans, the PBGC may authorize or direct the use of alternative procedures for determining benefit reductions.

See 29 C.F.R. 4022.61. (Attached as Exhibit "A") (emphasis added).

Oddly enough, instead of utilizing this discretion to ease the burden on the retired pilots, the PBGC has exercised its discretion to make the termination more burdensome on the pilots. The Court should not approve the proposed Agreement unless and until the PBGC agrees with the Debtors to mitigate the impact of the termination on Delta's retired pilots.

Pursuant to 29 U.S.C. § 1347, the PBGC can reverse the termination of a pension plan, where it "determines such action to be appropriate and consistent with its duties under this title [IV]." In the instant case, the Agreement inexplicably irrevocably waives PBGC's right to reverse termination of the Pilots Plan. If, after termination of the Pilots Plan, Congress subsequently discontinues the availability of the lump sum benefit, or if U.S. Air or another airline merges with Delta and alleviates the predicted impact of a mass retirement of Delta pilots, the alleged bases for termination may no longer exist. In this regard, USAir presently has over 1,700 of its own pilots on furlough who are available to replace Delta pilots on short notice, in case of retirement by Delta pilots. This Court should not approve the Settlement Agreement, as long as PBGC waives its right to reverse termination of the Pilots Plan at a subsequent date.

10. The Federal Aviation Administration (“FAA”) imposes a mandatory retirement age of 60 on commercial pilots. *See* 14 C.F.R. § 121.383. For its purposes, the PBGC calculates retirement benefits to participants in a terminated plan based on a normal retirement age of 65 with a penalty reduction of benefits for individuals who retire younger than age 65. Because the retired Delta pilots could not work beyond age 60, by operation of law, it is an unfair penalty to have their benefits re-calculated based on normal retirement age of 65, rather than the Pilots Plan’s normal retirement age of 60. The penalty reduction is severe, 7/12 of 1% for each month preceding the participant’s sixty-fifth birthday, rather than for each month under age 60. This Court should not approve the Settlement Agreement, unless PBGC agrees to exercise its authority to calculate benefits for retired Delta pilots utilizing age 60 as the normal retirement age.

11. The PBGC’s regulations reduce the benefit it pays to participants in a terminated plan after reducing any benefit increases that the terminated plan enacted within five years of its termination. During the last five years, Congress has raised the compensation limit for determining defined benefit from \$170,000.00 per year to \$200,000.00 per year. *See* 26 U.S.C. 401(a)(17) (attached as Exhibit “B”). Delta’s pilots are assigned to aircraft based on their seniority. Those with the highest seniority, *i.e.*, most years as Delta pilots, ordinarily fly the aircraft that pay the highest salaries. As seniority is a function of age, the pilots with greatest seniority are often the eldest of the active Delta pilots. Many pilots who retire from Delta earn in excess of \$200,000.00 per year, especially during their last years of employment, when they have reached maximum seniority. Consequently, the Settlement Agreement should not be approved without the following modifications:

- (a) Benefits should be calculated by PBGC based on the Congressional maximum

income used for calculating benefits, *i.e.*, up to \$200,000.00. Increase in maximum income used for calculation of benefits as a result of an act of Congress, should not be deemed an increase in benefits subject to PBGC's five-year look-back rule. That rule, 29 C.F.R. § 4022.25, reduces any benefit increases that a terminated pension plan has enacted within five years of its termination. Since the benefit increase in this instance is not the result of enactment by the plan, but is due to an act of Congress, PBGC should be required to agree that its calculation of benefits for retired Delta pilots will consider the Congressional maximum income permitted.

(b) The Pilots Plan calculates its normal retirement benefit as 60% of the retired pilot's final average earnings over the last three years of service. (*See* Joint Statement of Stipulated Facts, ¶12, ¶7). Pursuant to the PBGC's three-year look-back rule, it does not count a participant's last three years of earnings in calculating a benefit of a participant in a terminated pension plan. (*Id.*). For retired pilots, this is devastating. It is often their last three years of service that are their highest earning years due to the seniority that they have attained during those last three years. The Settlement Agreement should state that PBGC would not apply its three-year look-back rule in recalculating the benefits of retired pilots.

12. The Settlement Agreement proposes the date for termination of the Pilots Plan as September 2, 2006. The Order authorizing Debtors to pursue termination of the plan was not issued until September 5, 2006. As of the date of the instant Motion, the proposed Agreement had not been approved by the Administrator of the PBGC. If the Pilots Plan is terminated and placed in trusteeship by the PBGC, the date of termination should reflect the actual date the plan's assets are transferred to PBGC for trusteeship. The retired pilots should be spared the reduction in benefits that will occur for many as a result of PBGC termination, until PBGC assumes trusteeship of the

Pilots Plan, rather than selecting a mythical date (Sept. 2) and providing retroactive trusteeship. Since the PBGC was not responsible for administering the plan or investing its assets prior to trusteeship, the date of actual transition should be the date for termination, and in no event earlier than the date an agreement to terminate is approved by this Court and by PBGC's signatory.

13. Because Delta has agreed to pay almost 100 cents on the dollar to settle the claim of PBGC, (it may be more than 100 cents on the dollar, depending on Delta's calculation of the amount it owes to PBGC, an amount that it has withheld from the Court in the instant Motion), it appears that the Pilots Plan will be fully funded or almost fully funded after the infusion of stock and cash from Delta. Therefore, while retiring pilots will not receive the lump sum retirement benefit, sufficient assets will likely exist to pay all retired pilots (and all active vested pilots) the full amount of their respective vested benefits that they were promised, at least if the benefit is received as an annuity. If the Pilots Plan is terminated, the assets of the Pilots Plan and the money that Debtors will pay to PBGC should be used solely and exclusively for the benefit of the retired pilots and the vested participants in the Plan. The money should not be used to prop up PBGC's failing fortunes and to fund other terminated plans under PBGC's trusteeship. The Agreement must require this.

14. The active pilots still employed by Delta are in a better position to plan for the financing of their retirements as a result of the amendment to their collective bargaining agreement, which ceased contributions to the Pilots Plan and, instead, required Delta to fund a defined contribution plan for the active pilots. If the lump sum payment, as argued by Debtors was an incentive to retire early, the PBGC trusteeship of the Pilots Plan removes that incentive since the PBGC does not permit large lump sum benefits to be paid. *See* 29 C.F.R. 4022.7 (attached as Exhibit "C"). Moreover, the anticipated change in mandatory retirement age will permit active

pilots to continue working and earning long beyond the mandatory retirement age 60 in effect now. The proposed modifications to the Settlement Agreement come with little or no cost to other creditors or Debtors. The Pilots Plan with its assets, and the infusion of assets as a result of the proposed Settlement Agreement, appear to be more than sufficient to prevent the decrease in benefits that will be caused to the retired pilots if the proposed modifications are not incorporated into the Settlement Agreement. The PBGC should not be prejudiced since the assets of the Pilots Plan and the infusion of assets from Debtors upon emergence from Chapter 11 should be sufficient to fully fund the benefits of the retired pilots. To the extent, if any, that benefits of active pilots will not be fully funded (although they should be), active pilots have the ability to continue working, to have contribution paid into their defined contributions plans and, perhaps, to continue to earn their high salaries through age 65, instead of age 60, the age that was mandatory retirement for presently retired pilots. Furthermore, pursuant to the Letter of Agreement No. 51 between ALPA and Delta, the active pilots have been compensated for the plan termination by giving them \$650 million in notes and a \$2.1 billion general unsecured claim.

15. If this Court truly believes that the retired pilots should be shown the gratitude of Debtors for building Delta in earlier years and for their years of service, in view of the curtailment or diminution of their benefits, as a result of other actions taken by Debtors and approved by this Court, this Court should either reject the Settlement Agreement until after its hearing has been reopened in response to the Objectors' Motion to Reopen the Section 4041 Hearing, or, alternatively, this Court should reject the Settlement Agreement until it incorporates the modifications proposed by the Objectors to ensure that they are not prejudiced by the termination of the Pilots Plan, when it appears that there will be no disadvantage to the Debtors or the other creditors, by doing so.

WHEREFORE, the Objectors respectfully request that this Court deny the Motion for Approval of the Settlement Agreement with Pension Benefit Guaranty Corporation or, alternatively, require the modifications proposed by Objectors before agreeing to approval.

Yours, etc.

Dated: White Plains, New York
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